Supreme Court, U.S.
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No. 98-2002

In The

Supreme Court of the United States

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

Petitioners,

vs.

RICARDO RAMOS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Thirteenth Judicial District Of Texas

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION (WITH SUPPLEMENTAL APPENDIX)

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ARGUMENT

1. The Texas Court Found That Petitioners Had No Notice of Trial

Respondent claims that the "Questions Actually Presented for Review" are whether "use of the mails to provide notice constitute a violation of a party's due process rights," and whether "permitting a trial court to determine credibility of evidence in a swearing match violate a party's due process rights." Both of these misleading issues posited by Respondent are based upon Respondent's false assertion that Petitioners received notice of the trial setting by mail. In fact, the Texas Court of Appeals found that the Petitioners did not receive actual or constructive notice of the trial. Consequently, Respondent's argument that notice by mail is adequate for purposes of due process is immaterial in this case.

2. The Petition for Review does not Present New Federal Questions

Respondent also claims that Petitioners have raised issues for the first time in this Court. Again, Respondent is wrong. The record as a whole "shows either expressly or by clear intendment" that Petitioners brought "the claim of invalidity and the ground therefor . . . to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928).

The Texas court of appeals noted in its original opinion, "if the record establishes a defendant does [sic] not receive notice of the trial setting, it violates due process

to require the *Craddock* elements as a prerequisite to the granting of a new trial." *Balogh v. Ramos*, 1998 WL 257464 (Tex. App. – Corpus Christi May 21, 1998) (No. 13-97-461-CV) [App. B at 23]. Thus, it is clear that Petitioner raised the issue of whether federal due process precluded Texas courts from requiring Petitioners to prove, in addition to the absence of notice, that their failure to attend trial was not intentional or the result of conscious indifference (part of the so-called "*Craddock* test").

In addition, the excerpts of Petitioners' briefs in the courts below, which are reproduced in the Supplemental Appendix, show that Petitioners have consistently presented to the Texas Court of Appeals and the Texas Supreme Court the argument that placing upon Petitioners the burden to prove the elements of the *Craddock* test violated their federal due process rights. The Texas courts' unconstitutional placement of this additional burden of proof is an integral part of the state action that Petitioners claim to be unconstitutional.

The question of whether Petitioners waived their federal due process rights is not at issue in this appeal because the Texas courts did not find such a waiver. Nonetheless, Petitioners briefed the federal standard for a waiver of due process to demonstrate further the inconsistency between the "*Craddock* test" and the Petitioners' due process rights under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioners respectfully ask the Court to grant their petition for writ of certiorari and, after considering the briefs and arguments of the parties, reverse the judgment of the Texas court and remand the case for a trial on the merits.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Cover page and page 7 from Brief of Appellants, filed by Petitioners in the Texas Court of Appeals ..... Supp. App. 1

Cover Page and page -ii- from Appellants' Motion for Rehearing and Consideration En Banc, filed by Petitioners in the Texas Court of Appeals ..... Supp. App. 4

Cover page and excerpt from page -iii- from the Petition for Review, filed by Petitioners in the Texas Supreme Court ..... Supp. App. 6

Pages 1-4 of Motion for Rehearing of Petition for Review, Filed by Petitioners in the Texas Supreme Court ..... Supp. App. 8

NO. 13-97-461-CV

IN THE TEXAS COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

APPELLANTS

vs.

RICARDO RAMOS,

APPELLEE

No. C-2109-96-B Appealed from
The District Court of Hidalgo County, Texas
93rd Judicial District

BRIEF OF APPELLANTS STEVEN BALOGH AND KENOVA CONSTRUCTION CORPORATION

ORAL ARGUMENT REQUESTED

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ARGUMENT

I. ARGUMENT ON ISSUE NO. 1

The Defendants did not receive Notice of the Trial Setting; therefore, the Judgment Violates their State and Federal Constitutional Rights to Due Process, and the Trial Court Should Have Vacated the Judgment and Ordered a New Trial.

A. Legal standard for new trial after post-answer default judgment.

A judgment after default of the defendant must be set aside and a new trial ordered when (1) the defendant's failure to appear or answer was "not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident," (2) "the motion for new trial sets up a meritorious defense," and (3) granting the motion for new trial "will occasion no delay or otherwise work an injury to the plaintiff." *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). The same standards ordinarily apply to a motion for new trial after judgment due to a post-answer default, *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987), except that the final two elements are not required if the defendant produces evidence that it did not receive notice of the trial. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190 (1965); *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam); *Gonzalez v. State*, 832 S.W.2d 706, 707 (Tex. App. – Corpus Christi 1992, no writ). Requiring a defendant to prove the second two elements of the *Craddock* test as a prerequisite to a new trial violates the defendant's constitutional due process

rights when his failure to appear at a trial was due to lack of notice of the trial setting. *Peralta*, 485 U.S. 80; *Armstrong*, 380 U.S. at 550; *Lopez*, 757 S.W.2d at 723. Accordingly, a defendant who did not receive notice of the trial is entitled to a new trial without showing a meritorious defense or the absence of delay or other prejudice to the plaintiff's rights. *Lopez*, 757 S.W.2d at 723; *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12 (Tex. App. – Dallas 1994, no writ) (considerations of delay or prejudice to the plaintiff cannot overcome the defendant's right to notice as a fundamental component of due process); *Green v. McAdams*, 857 S.W.2d 816, 819 (Tex. App. – Houston [1st Dist.] 1993, no writ) (when defendant did not receive notice of trial, "it would violate due process to require the *Craddock* elements as a prerequisite to the granting of a new trial").

NO. 13-97-461-CV
IN THE TEXAS COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

APPELLANTS

vs.

RICARDO RAMOS,

APPELLEE

APPELLANTS' MOTION FOR REHEARING AND CONSIDERATION EN BANC

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NO. 98-1150

IN THE

SUPREME COURT

OF TEXAS

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

Petitioners

vs.

RICARDO RAMOS,

Respondent

PETITION FOR REVIEW

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ARGUMENT 1

I. The *Craddock* Test for a New Trial Does Not Apply When a Defendant's Constitutional Due Process Right to Notice of Trial Has Been Violated. In the Alternative, Lack of Notice to a Defendant of the Trial Setting Establishes or Supersedes the Requirement that the Failure to Attend Trial Was Not Intentional or the Result of Conscious Indifference 1

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C. The trial court's letter notice of the docket control conference did not give Balogh notice that failure to appear for the docket control conference could result in a trial on the merits without further notice 9

NO. 98-1151

IN THE SUPREME COURT OF TEXAS

STEVEN BALOGH and
KENOVA CONSTRUCTION CORPORATION,

Petitioners

vs.

RICARDO RAMOS,

Respondent

MOTION FOR REHEARING OF PETITION FOR REVIEW

For the reasons stated below, Petitioners, Steven Balogh and Kenova Construction Corporation (collectively called "Balogh"), respectfully move the Court to reconsider its denial of their Petition for Review.

ISSUES PRESENTED

1. After the Balogh Defendants answered and appeared in this case, the trial court conducted a bench trial and rendered judgment against Balogh for $133,750, including $100,000.00 in punitive damages, without giving Balogh any notice of the trial setting, thus depriving Balogh of the opportunity to defend by presenting evidence controverting the Plaintiff's claim that a stop payment order on a $5,000.00 check constituted fraud. Did the trial and the entry of judgment against Balogh without any notice violate Balogh's constitutional rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

2. The trial court sent Balogh, a pro se defendant, notice of a telephonic docket control conference, which stated that Plaintiff's counsel was required to initiate

the telephone call "if one is necessary." Plaintiffs' counsel excluded Plaintiff from the conference call by falsely representing to the trial court that Balogh's telephone number was not available, when, in fact, it had been provided in pleadings then on file with the trial court. Did the trial court's setting the trial date at the telephonic docket control conference without Balogh's participation or knowledge, and its subsequent failure to give Balogh any notice of the trial date, violate Balogh's constitutional rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

ARGUMENTS AND AUTHORITIES

Although Balogh properly preserved, briefed, and argued his constitutional claim that the trial court's trial of the case and rendition of judgment without giving Balogh notice of the trial violated his right to due process under the United States Constitution, the court of appeals affirmed the trial court's judgment with no analysis or ruling on Balogh's claim that his constitutional rights had been violated.

The court of appeals affirmed the trial court's judgment by applying the familiar *Craddock* three-prong test for a new trial after default judgment. *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). Although the court of appeals found that Balogh did not receive notice of the trial setting, it apparently found that the lack of notice, as a matter of law, did not cause Balogh's failure to appear for trial. The court of appeals affirmed the trial court on the basis that Balogh failed to prove the first *Craddock* prong – that his failure to appear

at trial was not intentional or the result of conscious indifference. [See Substituted Opinion at 6].

Trying a case and rendering judgment without notice to the defendant violates the defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. *Peralta v. Heights Medical Center Inc.*, 485 U.S. 80, 84-85, 108 S.Ct. 896, 899, 99 L.Ed.2d 75, 81 (1988). *LBL Oil Co. v. International Power Services, Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989); *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex.1988). In *Peralta*, the United States Supreme Court held that a party who did not receive notice of trial could not be required to prove a meritorious defense (the second prong of the *Craddock* test) as a prerequisite to a new trial. Texas cases decided after *Peralta* have uniformly reversed post-appearance default judgments when the defendant did not receive actual notice of the trial or hearing, without requiring the defendant to prove the *Craddock* elements. *See, e.g., LBL*, 777 S.W.2d at 390-91; *Lopez*, 757 S.W.2d at 723.

Depriving Balogh of his constitutional right to due process cannot be justified simply because he did not inquire to the court after he was excluded from the telephonic docket control conference as a result of the plaintiff's misrepresentation to the court that Balogh's telephone number was not available. The trial court's notice of the docket control conference could fairly be read to require the Plaintiff's counsel to initiate a telephone call only if the docket control conferernce was necessary. Thus, not receiving a call to participate in the telephonic docket control conference did not necessarily put Balogh on notice that the docket control conference

had been held without him. An equally reasonable inference was that the docket control conference had not been necessary. At any rate, there was no reason for Balogh to suspect that the court could set the case for trial without giving him notice of the trial date, and then try the case and render judgment against Balogh with absolutely no advance warning and no opportunity to defend.

Petitioners respectfully urge the Court to reconsider its denial of the Petition for Review, and to hold unequivocally that none of the *Craddock* elements are prerequisite to a new trial if the defendant did not receive notice of the trial or hearing that resulted in the judgment. Once the defendant shows that he did not receive notice, he has established a violation of his constitutional due process rights, and a new trial should be granted without further inquiry. *See LBL*, 777 S.W.2d at 390-91.

Only the granting of a new trial "would have wiped the slate clean," and restored Balogh "to the position he would have occupied had due process of law been accorded to him in the first place." *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965).

PRAYER FOR RELIEF

For the reasons stated, Petitioners ask the Court to reconsider its refusal to review the court of appeals' decision in this case and, after considering the briefs and arguments of the parties, sustain petitioners' issues

presented for review, reverse the judgment of the trial court and remand the case for trial on the merits.

Respectfully submitted,

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